No. 14-114

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID KING, *et al.*,

Petitioners,

v.

SYLVIA MATTHEWS BURWELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PACIFIC RESEARCH INSTITUTE, CATO INSTITUTE, AMERICAN CIVIL RIGHTS UNION, INDIVIDUAL RIGHTS FOUNDATION, AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

C. DEAN MCGRATH, JR.
MCGRATH & ASSOCIATES
1025 Thomas Jefferson St., N.W.
Suite 110G
Washington, DC 20007

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20036

BERT W. REIN
Counsel of Record
WILLIAM S. CONSOVOY
J. MICHAEL CONNOLLY
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
brein@wileyrein.com

Attorneys for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1979 and based in San Francisco, the Pacific Research Institute ("PRI") is a non-profit, non-partisan, 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free-market policy solutions to the issues that impact the daily lives of all Americans. Its activities include publications, public events, media commentary, invited legislative testimony, filing *amicus* briefs with courts, and community outreach.

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs with courts, conducts conferences, and publishes the annual *Cato Supreme Court Review.*

The American Civil Rights Union ("ACRU") is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have received appropriate notice and have consented to the filing of this brief.

a particular ideology. Since its founding in 1999 by Reagan welfare reformer Robert B. Carleson, the ACRU has filed *amicus* briefs on constitutional issues in cases nationwide.

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation and file *amicus* briefs in cases involving fundamental constitutional issues.

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SUMMARY OF ARGUMENT

This case raises important separation-of-powers issues. The Affordable Care Act ("ACA") encourages States to establish health insurance exchanges by offering qualified residents "covered by a qualified health plan ... enrolled in through an *Exchange established by the State* under Section 1311" a "premium assistance credit." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added). In the event a State fails to establish an Exchange, Section 1321 of the ACA empowers the Department of Health and Human Services ("HHS") to establish a federal Exchange.

When 36 States failed to establish Exchanges, HHS used its Section 1321 authority to establish federal Exchanges. But that left taxpayers enrolling through a federal Exchange ineligible for the "premium assistance credit." In the Administration's view, the ACA could have failed as national health care reform if subsidies were not made available on federal Exchanges. But rather than seek corrective legislation, the Internal Revenue Service ("IRS") ignored public objections about its lack of statutory authority and issued a final regulation "deeming" federal exchanges to be State Exchanges. 77 Fed. Reg. 30377 (May 23, 2012) ("IRS Rule").

The Fourth Circuit agreed that the agency lacked specific statutory authority, yet it, nevertheless, upheld the IRS Rule under *Chevron* deference. In so doing, it allowed the IRS to override fundamental principles of tripartite government. It was for Congress to determine whether those enrolled through federal Exchanges would receive subsidies. The Executive's responsibility under Article II was to faithfully carry out Congress's express decision to limit subsidies to those enrolled "through an *Exchange established by the State* under Section 1311." Because he did the opposite, this Court is now called upon to exercise its Article III responsibility to enforce the Constitution's separation of powers critical to our system of ordered liberty.

The Fourth Circuit's reliance on *Chevron* deference to uphold the IRS Rule independently calls for review. *Chevron* does not permit an executive agency to rewrite federal law to advance what it perceives, rightly or wrongly, to be the broad purpose of legislation. When the statute's text is unambiguous, as it is here, that is the

end of the matter. But even if the IRS were able to create tenuous ambiguity by cobbling together a miscellany of legislative provisions, as the Fourth Circuit found, substituting deference for the better textual construction is appropriate only if Congress intended for the agency to fill statutory gaps. There is no indication in the ACA that Congress delegated to the IRS the power to determine whether billions of federal subsidy dollars annually should be disbersed to those purchasing health coverage on federal Exchanges. The Court should reaffirm that an ambiguous statute cannot be used by the IRS to impose a tax or create a tax credit that is not specifically authorized by Congress.

Properly applied, *Chevron* supports the separation of powers by ensuring that courts do not usurp implementational discretion Congress has specifically delegated to government agencies. But the doctrine was not meant to be used (like it was here) as cover for the usurpation of legislative powers that Congress chose not to relinquish. The Court's review is, therefore, needed to reaffirm that judicial acquiescence to an agency regulation rewriting federal law is not *Chevron* deference. It is collusion between the court and the Executive to seize the lawmaking prerogative from Congress.

It is perhaps understandable that the IRS and the Fourth Circuit sought to aid taxpayers whose ability to afford health coverage was compromised by, among other things, the unavailability of credits on federal Exchanges and the failure of States to establish their own Exchanges. But that concern must be resolved through democratic means, however imperfect and inefficient they sometimes may be. The Court should grant review and reverse to

make clear that expediency does not trump constitutional order and promptly return the ACA subsidy issue to the political system where it belongs.

ARGUMENT

I. This Case Raises Important Separation Of Powers Issues Warranting The Court's Immediate Review.

The financial consequences of the issue presented in the Petition and the division of views between the Fourth and D.C. Circuits fully support a grant of certiorari. But immediate review also is justified by the more fundamental challenge at issue here: the IRS's blatant revision of a statutory provision that the Executive Branch claimed frustrated the health insurance program it wished to administer.

Under our tripartite system, "the great powers of the government are divided into separate departments" and are "regarded as independent of each other." *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838). No branch may exercise powers belonging to a coordinate branch. Indeed, the "safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 718 (1878). This "may appear 'formalistic' ... to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution ... divides power ... among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). The Petition properly seeks reaffirmation of that principle.

The Court has traditionally interceded in defense of the separation of powers regardless of whether the circuits are divided. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *INS v. Chadha*, 462 U.S. 919 (1983); *Clinton v. City of New York*, 524 U.S. 417 (1998); *MWAA v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Constitution's "high walls and clear distinctions" must be maintained because "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). "In this respect the device operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). Accordingly, there are no minor separation-of-powers violations. Judicial intervention prevents "a gradual concentration of the several powers in the same department." *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting); *Benjamin v. Jacobson*, 172 F.3d 144, 191 (2d Cir. 1999) (Calabresi, J., concurring) ("If the Separation of Powers ... is to be protected in its formal and symbolic importance, the courts must be the guardians.").

Importantly, the separation of powers "operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). The Court does not act as steward of these structural principles to advance the parochial interests of any branch nor for reasons of form alone. To be sure, "disregard [of] structural legitimacy is wrong in itself—but since structure has purpose, the disregard also has adverse practical consequences." *Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia,

J., dissenting). The Court intervenes because, as the Framers learned firsthand, "[c]oncentration of power in the hands of a single branch is a threat to liberty." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring); *MWAA*, 501 U.S. at 272 ("The ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed.").

These concerns are paramount in the lawmaking setting. *See Chadha*, 462 U.S. 919 (congressional veto); *Clinton*, 524 U.S. 417 (line-item veto). The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., art. I, § 1. "[T]he lawmaking function" therefore "belongs to Congress ... and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). The Executive may veto legislation he deems unwise subject to congressional override. But once a bill becomes law, the Executive must "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. In short, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S. at 587. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

The Petition arises from the IRS's assault on this foundational rule. The ACA entitles only those taxpayers enrolled "through an Exchange established by the State under section 1311" to receive "premium assistance amounts." Petition ("Pet.") 24-27. Yet the IRS

has effectively amended the statute, with the Fourth Circuit's blessing, to extend premium assistance to those enrolled through any Exchange "regardless of whether the Exchange is established and operated by a State ... or by HHS." 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20. The IRS Rule cannot be considered an "interpretation" of Section 36B if that concept is to have any meaning. "After all, the federal government is not a 'State' ... and its authority to establish Exchanges appears in section 1321 rather than 1311." *Halbig v. Burwell*, --- F.3d ---, 2014 WL 3579745, at *6 (D.C. Cir. July 22, 2014). "Congress knew how to provide that a non-state entity should be treated as if it were a state when it sets up an Exchange." *Id.* at *8. Dissatisfied with the consequences of the ACA's text, the IRS rewrote it and unacceptably invaded the legislative province.

The Fourth Circuit's support for the IRS Rule deals a blow to our tripartite system. The Administration obviously feared that the unavailability of premium assistance on federal Exchanges could cripple the President's signature initiative, and so it sought a remedy. But the Constitution does not give the IRS "the unilateral power to change the text of duly enacted statutes." *Clinton*, 524 U.S. at 419. "When Congress gives an agency its marching orders, the agency must obey all of them, not merely some." *Pub. Citizen v. NRC*, 901 F.2d 147, 156 (D.C. Cir. 1990). No rule of necessity overrides this constitutional principle.

This Executive's attempt to seize legislative powers is not without antecedents. Nor is it the first such encroachment to be clothed in honorable intentions. Indeed, this type of overreach has long been feared. "In all tyrannical governments the supreme magistracy, or the right of both making and of enforcing the laws, is vested

in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty." Sir William Blackstone, 1 Commentaries on the Laws of England, 146 (1783); *Loving*, 517 U.S. at 756 ("Even before the birth of this country, separation of powers was known to be a defense against tyranny."). The Framers took this lesson to heart. The Federalist No. 47 (J. Madison) (Jacob E. Cooke ed. 1961) ("[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.").

This dispute vindicates the Framers' concerns. The IRS's usurpation of legislative power comes not only at a steep price to the federal treasury, but to liberty. Because of the IRS Rule, individuals in States failing to establish an Exchange under Section 1311 must pay a penalty tax for choosing "not to purchase health insurance." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2588 (2012) (Roberts, C.J.). The IRS Rule also exposes most employers in these States to a penalty for failing to offer health coverage to full-time employees. Pet. 20. These are penalties only Congress may impose under the Constitution.

In sum, "when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court." *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013). The Court should grant immediate review to ensure that the constitutional separation of powers and the liberty interests it protects are not overridden by an overzealous Executive.

II. The Fourth Circuit's Improper Deference To The IRS Under *Chevron* Calls For Review And Reversal.

The Fourth Circuit could not find that the ACA's text unambiguously supported the IRS Rule. Rather, the court claimed that multiple interpretations were plausible, making "this a suitable case in which to apply the principles of deference called for by *Chevron*," and, appealing to the ACA's broad purposes, upheld the IRS Rule as reasonable. Appendix ("App.") 26a. For several reasons, however, the decision artificially justified "multiple interpretations" of the unambiguous language and thus wrongly concluded that the purported "ambiguity creates some discretionary authority for the agency to fulfill." App. 27a n.4.

Foremost, Section 36B is not susceptible to multiple interpretations. Pet. 24-27. That should be the end of the matter because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Upholding an administrative regulation, such as the IRS Rule, that varies from the statute's unambiguous text usurps Congress's choice *not* to delegate its "lawmaking power" to the agency. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980).

But even if the statute were ambiguous, the claim of an implicit delegation is especially inappropriate here given that the IRS Rule affects individual tax liability and involves Congress's taxing power. Close examination of the power of taxation reveals there is no basis for concluding that the IRS has the authority to impose taxes or grant tax credits by means of an ambiguous statute. The taxing

power has a unique place in our history. King George's unjust imposition of taxes on the Colonies was one of the chief charges against him: "He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation .... For imposing taxes on us without our Consent." The Declaration Of Independence para. 15 (1776); *Gordon v. Holder*, 721 F.3d 638, 649 (D.C. Cir. 2013) ("The demand that taxation regimes possess democratic legitimacy finds deep roots in the founding of our republic.").

The Framers knew all too well that "the power to tax involves the power to destroy." *M'Culloch v. Maryland*, 17 U.S. 316, 431 (1819). That is why all taxation legislation must originate in the House of Representatives. *See* U.S. Const., art. I, § 7, cl. 1. Members of the House "were chosen by the people, and supposed to be the best acquainted with their interest and ability," 1 Annals of Cong. 65 (1789) (Joseph Gales ed., 1834), and thus most likely to protect the federal treasury against profligate spending, The Federalist 66, at 401-02 (A. Hamilton) (Jacob E. Cooke ed. 1961). As a consequence, judicial review of tax laws has been framed by the understanding that the "taxing power is one of the most jealously guarded prerogatives exercised by Congress." *Air Power, Inc. v. United States*, 741 F.2d 53, 56 (4th Cir. 1984). "[E]xemptions from taxation" therefore "are not to be implied; they must be unambiguously proved." *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); Pet. 28-29. That holds true for tax credits, which "are only allowed as clearly provided for by statute, and are narrowly construed." *United States v. McFerrin*, 570 F.3d 672, 675 (5th Cir. 2009).

Accordingly, "deference cannot apply to the proper interpretation of § 36B." Pet. 29. Congress may not "delegate power to determine whether taxes should be imposed.... [This is] the difference between delegating the underlying power to set basic policy ... and the authority to exercise discretion in administering the policy." *The Constitution of the United States of America: Analysis and Interpretation*, Congressional Research Service, Sen. No. 112-9, at 93 (2013). Nothing in *Mayo Foundation v. United States*, 562 U.S. 44 (2011), deviates from this long settled understanding. Pet. 29. The Court has never endorsed the proposition that the IRS can rely on an ambiguous statute or policy goals to impose a tax or grant tax credits. Authorizing the King to impose a tax "consistent with fundamental policy goals" would have been unthinkable to the Founders.

But even if such legislation is theoretically eligible for *Chevron* deference, it is not credible to presume that Congress surrendered *this* massive taxation authority sub silentio. "*Chevron* deference ... rests on a recognition that Congress has delegated to an agency the interpretative authority to implement a particular provision or answer a particular question." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1882 (2013) (citation omitted). There is no reason to believe Congress gave the IRS the power to grant federal tax credits to those purchasing health coverage through federal Exchanges. The Court is "guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 133 (2000). It defies common sense to think that Congress used Section 36B to give the IRS the unfettered

discretion to decide whether to spend billions of taxpayer dollars annually. Pet. 28.

The Fourth Circuit hypothesized that "Congress *perhaps* might not have wanted to resolve a politically sensitive issue" or "it *might* have intended to see how large a role the states were willing to adopt on their own before having the agency respond with rules ...." App. 27a n.4 (emphasis added). But neither theory passes muster. As noted above, the issue's political sensitivity cuts against presuming a delegation here—not in favor of it. And the suggestion that Congress took a wait-and-see approach concerning the availability of tax credits on federal Exchanges contradicts the Fourth Circuit's own theory of the case. This issue only arises after a State has failed to establish an Exchange; there was thus no reason for Congress to wait and see what the States would do before deciding whether to include what the defenders of the IRS Rule describe as a "contingency provision," App. 34a (Davis, J., concurring). In other words, it is implausible to presume Congress delayed addressing how to grapple with a multi-billion-dollar contingency until *after* that contingency arose. The Court cannot presume the delegation of an issue this significant based on such shaky reasoning.

The invocation of *Chevron* deference below is a serious problem. A judicial decision using *Chevron* to impose the court's own sense of what is good policy is no less a blow to separation-of-powers than Executive encroachment. Elevating the court's own policy concerns over the statutory text exceeds the judiciary's "limited role in [the] tripartite government." *Robbins v. Chronister*, 435 F.3d 1238, 1243 (10th Cir. 2006). "While '[i]t is emphatically the

province and duty of the judicial department to say what the law is,' it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *Tenn. Valley Auth.*, 437 U.S. at 194. Courts have no authority to "amend or modify any legislative acts" or judge "questions as expedient or inexpedient, as politic or impolitic," *License Tax Cases*, 72 U.S. 462, 469 (1866).

In fact, the Fourth Circuit's decision creates the very problem that *Chevron* was designed to solve. "Before *Chevron*, each of hundreds of federal judges had substantial policymaking power." Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225, 2233 (1997). *Chevron* ensures that policymaking resides in the political branches and that the power either to make the legislative choice itself or delegate that responsibility to an agency remains "under the control of Congress." Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. Rev. 551, 555-56 (2012). When there has been no delegation, the court's task is to enforce Congress's choice. And when there has been a delegation, *Chevron* keeps judges "from substituting their own interstitial lawmaking for that of an agency." *City of Arlington, Tex.*, 133 S. Ct. at 1873. Under no circumstance, however, is the Court to impose its *own* policy judgment under the guise of administrative deference.

The Fourth Circuit lost sight of this cardinal rule, siding with the IRS because its reading aligned with what the court saw as "the broad policy goals of the Act." App. 27a. But "[v]ague notions of statutory purpose provide no warrant for expanding" Section 36B "beyond the field to

which it is unambiguously limited." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2044 (2012). Honoring the ACA's text irrespective of the statute's "broad policy goals" is not arbitrary judicial policy—it follows from first principles. Courts apply laws not intentions because "[t]he law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself." *Aldridge v. Williams*, 44 U.S. 9, 24 (1845). Put simply, "the law *is* what the law *says*." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring).

In any event, the Fourth Circuit's suggestion that the ACA's *only* goal was to expand health coverage at all costs is overly simplistic and wrong. There is ample evidence that Congress also was concerned with incentivizing State participation and making States politically accountable. Pet. 2-5. The ACA's own Medicaid expansion provisions expressly rely on financial incentives to induce State participation or to have their disadvantaged citizens bear the consequences. The suggestion that the singular purpose of the federal Exchanges is to provide health care coverage to those individuals eligible for tax subsidies is similarly mistaken. "Federal Exchanges might not have qualified individuals, but they would still have customers—namely, individuals who are not 'qualified individuals.'" *Halbig*, 2014 WL 3579745, at *12. Those customers would secure the savings that the ACA envisions as resulting from increased competition at centralized, transparent shopping venues. In sum, the assertion below that the IRS Rule comports with some singular congressional goal ignores the ACA's multiple and often conflicting objectives.

The reality, of course, is that searching legislative history for a unified intent almost always ends in disappointment. "Every legislat*or* has an intent, which usually cannot be discovered, since most say nothing before voting on most bills; and the legislat*ure* is a collective body that does not have a mind; it 'intends' only that the text be adopted, and statutory texts usually are compromises that match no one's first preference." Frank H. Easterbrook, foreword to *Reading Law: The Interpretation of Legal Texts*, by Antonin Scalia & Bryan A. Garner xxii (1st ed. 2012). More often than not, individual legislators have sharply different views on the goals and scope of their enactments, so "the words by which the legislature undertook to give expression to its wishes" offer the most "persuasive evidence" of a statute's purpose. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

It should come as no surprise when a final product lacks an internally consistent purpose as legislation often passes through compromise and negotiation. "[L]egislative preferences do not pass unfiltered into legislation; they are distilled through a carefully designed process that requires legislation to clear several distinct institutions, numerous veto gates, the threat of a Senate filibuster, and countless other procedural devices." John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2390 (2003). Results that might seem ill-fitting as an abstract policy matter "may be perfectly rational from a legislative process perspective." *Id.* at 2431. For "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990).

Attempting to divine a singular legislative purpose is thus hazardous even as a last resort. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."). But to use the results of this kind of vague judicial inquiry into legislative motive as the interpretative touchstone when the text is unambiguous is constitutionally intolerable.

Indeed, the legislative history of the ACA is a case study in why the search for a unitary legislative intent is treacherous. To state the obvious, the ACA was hardly the result of a deliberative, rational process in which Congress acted with clarity of purpose. "The debate over health care was contentious from the legislation's inception, and enacting it required a variety of ad hoc procedures." John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 Law Libr. J. 131, 133 (2013). "[F]ragile truce[s]" and "delaying tactic[s]" plagued the process as the ACA's proponents tried to insulate themselves from filibuster. *Id.* at 156. The end result was a 2,700-page reformation of the American health care system. That few, if any, lawmakers read the bill is obvious from its length. Key House and Senate members admitted as much. Speaker Nancy Pelosi explained: "We have to pass the bill so that you can find out what is in it—away from the fog of the

controversy."[2] Senate Finance Committee Chairman Max Baucus similarly added: "I don't think you want me to waste my time to read every page of the healthcare bill."[3]

Given this "rough and tumble of the legislative process," *Robbins*, 435 F.3d at 1243, it would be folly to rely on unified congressional purpose as an interpretative foundation. In a case like this, the law's text is the only sure footing. When courts rewrite statutes to better effectuate Congress's overall purpose, they "become effective lawmakers, bypassing the give-and-take of the legislative process." *City of Joliet, Ill. v. New West, L.P.*, 562 F.3d 830, 837 (7th Cir. 2009). Courts therefore must resist the urge to create a more purposeful, internally consistent statute. It is not the judiciary's job to achieve "a more coherent, more rational statute." *Robbins*, 435 F.3d at 1243. By glossing over hidden legislative compromises, judicial adjustments invade the heartland of Congress's domain.

Stripped of inappropriate administrative deference and unwarranted reliance on congressional purpose, there can be no doubt Petitioners have "the better reading of the statute under ordinary principles of construction." *Cal.*

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2. Democratic Leader Nancy Pelosi, News Room: Speeches, http://www.democraticleader.gov/news/press/pelosi-remarks-2010-legislative-conference-national-association-counties (last visited Sept. 2, 2014).

3. Matthew Sheffield, "Max Baucus, Author of Obamacare, Admits He Never Read His Own Bill," *San Francisco Examiner*, Aug. 24, 2010, http://www.sfexaminer.com/sanfrancisco/max-baucus-author-of-obamacare-admits-he-never-read-his-own-bill/Content?oid=216170 8.

Dental Ass'n v. FTC, 526 U.S. 756, 766 (1999); *see Halbig*, 2014 WL 3579745, at *7-13. That should have ended this case: "The role of this Court is to apply the statute as it is written—even if we think some other approach might accord with good policy." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

III. Review And Reversal Of The Decision Below Will Properly Restore The Coverage Issue To The Political Process.

The Fourth Circuit's endorsement of the IRS's construction appears to have been driven by its concern over the "unforeseen and undesirable consequences" of enforcing the statute as written. App. 31a; App. 40a (Davis, J., concurring) (finding that "Appellants' approach would effectively destroy the statute"); *Halbig*, 2014 WL 3579745, at *19 (Edwards, J., dissenting) ("It is inconceivable that Congress intended to give States the power to cause the ACA to 'crumble.'"). The court simply would not "help to deny to millions of Americans desperately-needed health insurance" by striking down the IRS Rule. App. 40a (Davis, J., concurring); *Halbig*, 2014 WL 3579745 at *18 (Edwards, J., dissenting) ("This case is about Appellants' not-so-veiled attempt to gut the [ACA].").

This is deeply troubling. Judicial decisions cannot turn on antipathy for petitioners' purported motives or judicial sympathy for those who would benefit from rewriting a statute. *See, e.g., Sundance Assocs., Inc. v. Reno*, 139 F.3d 804, 809-10 (10th Cir. 1998). "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta*, 488 U.S. at 407. While it might be tempting for the courts to collude

with the IRS to expand health care coverage, such inter-branch collusion would cause long-term institutional damage. We must always remain a "government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

Thus, even if Section 36B were a drafting oversight—producing a law inadvertently undercutting what Congress intended—it *still* must be enforced as written. The Court cannot "soften the import of Congress's chosen words even if [it] believe[s] the words lead to a harsh outcome." *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004). To do so "would be to legislate, and not to interpret and give effect to the statute as passed by Congress." *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 43 (1895). "To supply omissions ... transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250-51 (1926); *Lamie*, 540 U.S. at 542 ("It is beyond [this Court's] province to rescue Congress from its drafting errors, and to provide for what [it] might think is the preferred result.").

In any event, like Mark Twain's death, the report of the ACA's demise at the hands of petitioners has been greatly exaggerated. The IRS Rule made State refusals to establish Exchanges politically costless. But States will have a much more difficult choice to make if their refusal denies residents tax credits that help make health insurance coverage more affordable. "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds" and States are free to reject the bargain. *NFIB*, 132 S. Ct. at 2603. "The States are separate and independent sovereigns. Sometimes they have to act like it." *Id.* The IRS Rule obliterates that responsibility.

Further, "if Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent." *Lamie*, 540 U.S. at 542. Congress has a long history of doing just that. *See, e.g.* 29 U.S.C. § 251(a) (abrogating *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)); Pub. L. No. 111-2, 123 Stat. 5 (2009) (abrogating *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); *Alden v. Maine*, 527 U.S. 706, 719-21 (1999) (discussing *Chisholm v. Georgia*, 2 U.S. 419, 420 (1793) and the history behind the passage of the Eleventh Amendment). In each case, once this Court faithfully interpreted the law, Congress constitutionally responded by working its will legislatively.

This case should be no different. Congress is free to "turn[] to technical corrections" when "it wishes to clarify existing law." *Exxon Mobil Corp. & Affiliated Cos. v. C.I.R.*, 136 T.C. 99, 119 (Tax Ct. 2011). Indeed, Congress "must routinely correct for technical errors and sometimes amend new provisions after enactment to harmonize old and new laws." Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 Va. Tax Rev. 645, 670 (2003); *see, e.g.*, Tax Technical Corrections Act of 2007, Pub. L. No. 110-172, 121 Stat. 2473 (2007). Moreover, [e]xisting procedures such as suspension of the rules or proceeding under unanimous consent" give Congress the tools to fix legislation "on an expedited schedule." John C. Nagle, *Corrections Day*, 43 UCLA L. Rev. 1267, 1281 (1996). "It should not be hard to secure legislative correction of [an] alleged judicial error if the courts have in fact misread the Congressional purpose and the consequences to the revenue are as serious as the government says." *Paddock v. United States*, 280 F.2d 563, 568 (2d Cir. 1960) (Friendly, J.).

That the ACA is controversial does not alter the analysis. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002); Scalia & Garner, *supra*, at 1615. Nor should the political odds of such a correction bear on the proper result here. "The Framers of the Constitution could not command statesmanship," and "[f]ailure of political will does not justify unconstitutional remedies." *Clinton*, 524 U.S. at 449, 452-53 (Kennedy, J., concurring). Regardless of legislative inaction, the courts "are not at liberty to rewrite [laws] to reflect a meaning [they] deem more desirable." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008). Congress—not the courts—has been entrusted with "the final say on policy issues." *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 234 (1956).

A respect for constitutional order should be paramount. This is not the first time claimed necessity has prompted the President to invade Congress's domain. But "[t]he Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring). "Nothing prevents the President from returning to Congress to seek the authority he believes necessary," and "judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means." *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring). Granting certiorari and reversing the Fourth Circuit's decision is necessary to confirm that the Court remains true to this fundamental bulwark of our constitutional system.

CONCLUSION

Amici curiae respectfully ask that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

C. Dean McGrath, Jr.
McGrath & Associates
1025 Thomas Jefferson St., N.W.
Suite 110G
Washington, DC 20007

Ilya Shapiro
Cato Institute
1000 Massachusetts Ave., NW
Washington, DC 20036

Bert W. Rein
Counsel of Record
William S. Consovoy
J. Michael Connolly
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
brein@wileyrein.com

Attorneys for Amici Curiae

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